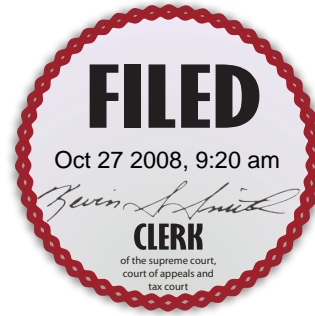


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

SAUL O. GLASSMAN,

Appellant,

vs.

STATE OF INDIANA,

Appellee.

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No. 20A03-0803-CR-121

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0612-FA-00060

October 27, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Saul A. Glassman (“Glassman”) was convicted in Elkhart Superior Court of three counts of Class A felony child molesting and two counts of Class C felony child molesting. The trial court sentenced Glassman to an aggregate term of ninety years in the Department of Correction. Glassman appeals on four issues:

- I. Whether Glassman’s convictions violated double jeopardy;
- II. Whether the trial court abused its discretion in allowing the State to examine Glassman about the circumstances attendant to his divorce.
- III. Whether the trial court abused its discretion in denying Glassman’s motion for a mistrial; and,
- IV. Whether Glassman’s sentence is inappropriate.

We affirm.

Facts and Procedural History

At the time of trial, J.B. was sixteen years old. Glassman was her stepfather from the time she entered third grade through seventh grade. J.B. lived with Glassman, her mother, and her younger brother, D.B. during this time period.

When J.B. was in third grade, Glassman would order D.B. to stay in D.B.’s room or the basement until Glassman told him to come out. During that time, Glassman would inappropriately touch J.B. This continued throughout J.B.’s third, fourth, fifth, sixth, and seventh grade years. Glassman told J.B. to keep the molesting a secret or he would hurt J.B.’s mother. If she resisted or threatened to tell, Glassman would hit her or otherwise punish her. During one incident, D.B. opened the door to J.B.’s bedroom and saw Glassman and J.B. naked in bed. Glassman told D.B. not to tell anyone.

In 2004, J.B.'s mother separated from Glassman but the two still maintained contact. During this time, J.B. finally told her mother about the molestation but asked her mother not to tell anyone. J.B. later told her father, who took her to the police to report the molesting.

The State charged Glassman with three counts of Class A felony child molesting and two counts of Class C felony child molesting. Additionally, the State filed a charge of repeat sexual offender based on a prior conviction for child molesting. The jury found Glassman guilty on all counts. Glassman admitted to being a repeat sexual offender. The trial court sentenced Glassman to an aggregate sentence of ninety years.

I. Double Jeopardy

Glassman argues that his convictions constitute a violation of double jeopardy principles under Article 1, Section 14 of the Indiana Constitution. That Clause provides in relevant part, "No person shall be put in jeopardy twice for the same offense." Ind. Const. Art. 1, § 14.

Glassman argues that his convictions violate double jeopardy principles because the time frames for the counts overlap as to the beginning and ending months. Specifically, Count I, Class A felony child molesting, alleges that the molesting took place "on or between August 12, 1999, through January 2000," and Count III, Class A felony child molesting, alleges that the molesting took place "on or between January, 2000 through January, 2002. Count V, Class A felony child molesting, alleges that the molesting took place "on or between January 2002 through May 2004." Count II, Class C felony child molesting, alleges that that molesting took place "on or between August

12, 1999, through January 2000.” Count IV, Class A felony child molesting, alleges that the molesting took place “on or between January, 2000 through January, 2002.”

In Richardson v. State, 717 N.E.2d 32 (Ind. 1999), our supreme court set forth a test for evaluating double jeopardy challenges arising under the Indiana Constitution. In Richardson, the court determined that two convictions may be the “same offense” in violation of the Indiana Double Jeopardy Clause if, “with respect to **either** the statutory elements of the challenged crimes **or** the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.” Id. at 49 (emphasis in original).

The statutory elements test is inapplicable because the challenge is premised upon convictions under multiple counts for the same offense. Peckinpaugh v. State, 743 N.E.2d 1238, 1242 (Ind. Ct. App. 2001), trans. denied. Under the actual evidence test, the question is whether the actual evidence used to convict Glassman under the various counts was the same as the actual evidence used to convict him on the other counts. In order to prevail, Glassman must “demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.” Richardson, 717 N.E.2d at 53.

At trial, J.B. testified that Glassman molested her numerous times from third grade to seventh grade. She testified that the touching happened in “every season.” Tr. p. 69. Also, no testimony at trial specifically set any of the molestations in January 2000 or January 2002, which are the months that overlap. Because there is no specific evidence

regarding the dates of the molestations, there is no reasonable possibility that the jury could have determined that the offenses occurred during the overlapping months. Therefore, Glassman's convictions do not violate double jeopardy principles under the Indiana constitution.

II. Admission of Evidence

Glassman next argues that the trial court abused its discretion when it allowed testimony related to the reasons for his divorce from J.B.'s mother. The admission and exclusion of evidence lies within the sound discretion of the trial court; therefore we review admission of evidence for abuse of that discretion. State v. Lloyd, 800 N.E.2d 196, 198 (Ind. Ct. App. 2003). Such an abuse occurs when the "decision is clearly against the logic and effect of the facts and circumstances." Id. We will only consider "evidence in favor of the trial court's ruling and unrefuted evidence in the appellant's favor." Id.

On January 11, 2004, while alone in his house, Glassman started a fire in the basement. He went upstairs and sat in a chair until he was overcome with smoke. Glassman survived, however, and was taken to a psychiatric center for treatment for an apparent suicide attempt.

Soon thereafter, Glassman and J.B.'s mother spoke with an attorney, and they discussed the potential impact the fire and Glassman's apparent suicide attempt would have on J.B.'s mother's custody of the two children. Although neither Glassman nor J.B.'s mother wanted a divorce, Glassman filed for divorce in an attempt to help J.B.'s mother maintain custody of the two children. Following the separation, Glassman and

J.B.'s mother continued to have contact, which sparked arguments between J.B. and her mother. It was during one of the arguments that J.B. told her mother of Glassman's molestations but asked her not to tell anyone. J.B. later told her biological father of the molestations and he took J.B. to the police.

Glassman claims that testimony related to the fire and suicide attempt should not have been allowed under Evidence Rule 404(b) because it could be viewed as evidence of prior bad acts. In assessing the admissibility of evidence under Evidence Rule 404(b), we must (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Evidence Rule 403. Gillespie v. State, 832 N.E.2d 1112, 1117 (Ind. Ct. App. 2005). "Although evidence of a prior bad act is generally not admissible under Ind. Evid. R. 404(b), 'otherwise inadmissible evidence may become admissible where the defendant 'opens the door' to questioning on that evidence.'" Crafton v. State, 821 N.E.2d 907, 911 (Ind.Ct.App.2005) (quoting Jackson v. State, 728 N.E.2d 147, 152 (Ind.2000)). Evidence that is relied upon to open the door, however, must leave the trier of fact with a false or misleading impression of the facts related. Crafton v. State, 821 N.E.2d 907.

At trial, the trial court initially ruled that the State would not be allowed to ask questions related to "the suicide, nothing about the fire, nothing about the medications." Tr. p. 235. However, Glassman later testified that he and J.B.'s mother had differences of opinion that resulted in the divorce. Tr. p. 237. The trial court agreed that Glassman's statement was misleading after the State said that J.B.'s mother would testify that the

divorce came about after Glassman started the fire in their home and the attempted suicide, and that her attorney advised filing for divorce if she wanted to keep the two kids.

Glassman's testimony gave the jury the misleading impression that the reason for the divorce was a mere difference of opinion. The testimony on the reasons for the divorce was relevant to the issues presented at trial because it helped to explain the relationship of Glassman and J.B.'s mother. Evidence Rule 404(b) did not bar admission of the State's recross examination; therefore, the trial court did not abuse its discretion when it allowed the State to clarify Glassman's testimony. Additionally, the testimony was not unfairly prejudicial under Evidence Rule 403. The State's recross examination was probative of Glassman's truthfulness and necessary to clarify Glassman's prior testimony as it related to his relationship with J.B.'s mother. Also, the level of prejudice was not significant, in that suicide was never mentioned during the testimony.

III. Mistrial

Glassman next argues that the trial court abused its discretion when it denied his motion for a mistrial. We recognize that the decision to grant or deny a motion for mistrial is left to the sound discretion of the trial court. Alvies v. State, 795 N.E.2d 493, 506 (Ind. Ct. App. 2003), trans. denied. We will only reverse the trial court's ruling if the trial court abused its discretion. Id. Also, we note that the trial court is afforded deference on appeal due to its ability to evaluate the circumstances of an event and its impact on the jury. Id. For Glassman to prevail on appeal, he must show that the "conduct in question was so prejudicial and inflammatory that he was placed in a position

of grave peril to which he should not have been subjected.” Id. “We determine the gravity of the peril based upon the probable persuasive effect of the misconduct on the jury’s decision rather than upon the degree of impropriety of the conduct.” Id.

Only when no other cure can be expected to rectify the situation will the extreme sanction of mistrial be used. Id. “Reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings because a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant’s rights and remove any error created by the objectionable statement.” Id.

Glassman argues that the trial court should have granted his request for a mistrial because of the State’s question that related to Glassman’s medications. After the trial court allowed the State to delve into previously limited areas, the State questioned Glassman about the fire, reasons for divorce, and then asked about the medications Glassman was taking at the time of the fire. Glassman made a partial answer before being stopped by the trial court. The trial court determined that the State had exceeded the scope of its prior ruling. After denying Glassman’s request for a mistrial, the trial court admonished the jury.

As noted above, a timely and accurate admonishment is presumed to cure any error in admission of evidence. James v. State, 613 N.E.2d 15, 22 (Ind. 1993). The trial court determined that an admonishment was appropriate and adequate and that a mistrial was not warranted. Also, Glassman has not shown that the admonishment was inadequate and that he was placed in grave peril as a result of the questioning. The question did not relate directly to the charges and is only tangentially relevant to the

ultimate issues. We conclude that the trial court did not abuse its discretion when it denied Glassman's motion for mistrial.

IV. Inappropriate Sentence

Glassman finally argues that his ninety-year sentence was inappropriate.¹ Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2007); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied. "[A] defendant must persuade the appellate court that his or her sentence has met the inappropriateness standard of review." Anglemyer v. State, 868 N.E.2d 482, 494 (Ind. 2007). Additionally, "[s]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." Id. at 490.

The sentence under review is not inappropriate in light of the nature of the offenses and the character of the offender. The nature of the crimes are particularly heinous. Glassman forced his stepdaughter to perform numerous sex acts with him for a period of five years. Glassman's violation of his position of trust as J.B.'s stepfather makes this especially disturbing. He threatened J.B. with punishment and harm to her mother. Glassman also has a 1989 conviction in Elkhart County for Class C felony child molesting. The trial court did note that Glassman admitted to being a repeat sex offender and likely took that into account when sentencing him to a sentence less than the maximum.

¹ Glassman argues that his military record and gainful employment should have been considered as mitigators. He failed to advance these as mitigators at sentencing and cannot do so for the first time on appeal. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). The argument is waived.

Accordingly, we conclude that Glassman's ninety-year sentence is not inappropriate in light of the nature of the offenses and the character of the offender.

Conclusion

Glassman's convictions do not violate the double jeopardy principles. The trial court did not abuse its discretion when it admitted evidence of the circumstances surrounding Glassman's divorce and when it denied Glassman's motion for mistrial. Glassman's ninety-year sentence was not inappropriate in light of the nature of the offenses and the character of the offender.

Affirmed.

BAKER, C.J., and BROWN, J., concur.